IN THE

Supreme Court of the United States

October Term, 1974

No. 74-418

EDWIN DUBA,

Petitioner,

vs.

W. DON McINTYRE, DONALD LISSMAN and BERNARD J. ACH

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT BERNARD J. ACH IN OPPOSITION

OPINIONS BELOW

I. The opinion of the District Court for the District of Nebraska, Honorable Richard E. Robinson, Judge; Unreported opinion (App. of Petition).

II. The opinion of the Court of Appeals for the Eighth Circuit No. 73-1724, July 18, 1974 (App. of Petition).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on July 18, 1974. The petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C., § 1254 (1).

QUESTION PRESENTED

Whether judicial immunity applies to a City Attorney who prepared an Affidavit for a Bench Warrant in an attempt to effectuate the collection of a lawful fine which had not been paid, in an action brought against the City Attorney for malicious prosecution and violation of 42 U. S. C., § 1983.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions of the United States Constitution (U. S. Const. amend. XIV, section 1) and the U. S. Statutes involved (17 Stat. 13, 42 U. S. C., section 1983) are set forth in the Petition at pages 3 and 4. The following statute is also relevant:

> Execution for the enforcement of a judgment before a justice of the peace, except where it has been taken to the district court on appeal, or docketed therein, or during the time it may be stayed, as provided by this article, may issue by the justice before whom the judgment was rendered, or by his successor in office on the application of the party entitled thereto, at any time within five years of entry of the judgment, or the date of the last execution issued thereon. Neb. Rev. Stat. § 27-1061 (Reissue 1964).

STATEMENT

This action was brought by the petitioner, Edwin Duba, for damages arising out of an alleged malicious prosecution, false arrest and violation of his civil rights under 42 U. S. C., § 1983. The case was filed in the United States District Court for the District of Nebraska, jurisdiction based on U. S. C., § 1343 and 42 U. S. C., § 1983. Bernard Ach, filed an answer alleging among other de-

fenses the defense of judicial immunity. Mr. Ach, as well as the other respondents, filed a motion for summary judgment based on the fact that there was no genuine issue as to any material fact and that the respondent was entitled to a judgment as a matter of law. The motions for summary judgment, of all the respondents, were sustained, and the case dismissed, by the Honorable Richard E. Robinson, without a reported opinion. (App. p. 9 of Petition)

The Court of Appeals affirmed the judgment of the District Court. (App. p. 18 of Petition)

On the 11th day of September, 1970, petitioner entered a plea of guilty in the Justice of the Peace Court, Friend, Nebraska, to a charge of unlawfully permitting hogs to run at large upon the city streets, alleys and public grounds of the City of Friend, Nebraska, for which a fine was imposed by said Court in the amount of $55.00, together with costs in the sum of $4.00. Petitioner was then released upon the condition that said fine and costs would be paid within one week.

On the 24th day of September, respondent, Bernard J. Ach, the duly appointed and acting City Attorney of Friend, Nebraska, executed an Affidavit for Bench Warrant and delivered it to the respondent, W. Don McIntyre, the duly elected, qualified and acting Justice of the Peace for the District of Saline County, Friend, Nebraska.

The respondent, W. Don McIntyre, on September 24, 1970, issued a Bench Warrant and delivered it to the respondent, Donald Lissman, the qualified, appointed, and acting Chief of Police of Friend, Nebraska. Also on September 24, respondent McIntyre executed and de-

livered to the respondent, Lissman, an Order of Attachment in Aid and Execution.

On September 24, 1970, the respondent, Lissman, arrested the plaintiff, Edwin Duba, and placed him in jail for about 1 hour, and attached certain swine in which the petitioner had an interest, and said swine were sold at a public auction on September 25, 1970. The petitioner's fine was satisfied out of the proceeds of the sale and the excess proceeds were delivered to the rightful owner of the swine.

The petitioner brought this action against the respondent, Bernard J. Ach, and the other respondents for their parts in enforcing the fine levied against the petitioner on September 11, 1970.

ARGUMENT

The United States Court for the District of Nebraska carefully considered all of the petitioner's arguments in light of the undisputed facts. It is clear that the execution of the Bench Warrant and delivery to the Justice of the Peace was within the duties of the City Attorney. Neb. Rev. Stat., § 27-1601 (Reissue 1964) The District Court found, that under pertinent Nebraska law, there was jurisdiction over the subject matter and over the person, and that the respondent, Bernard J. Ach, was entitled to the defense of judicial immunity. (App. p. 15-16 of Petition)

The District Court did not grant summary judgment to the respondent on the basis of a totally unqualified immunity as indicated by the petitioner. The fact that the District Court did not adopt this theory is evident from its opinion. The District Court and the Circuit

Court applied the clear *absence* of jurisdiction verses the *excess* of jurisdiction test. (App. p. 11 & 21 of Petition)

There is an unanimity among other lower courts in upholding the applicability of judicial immunity to prosecuters acting within their prosecutorial capacity. *Bauers v. Heisel,* 361 F. 2d 581 (3rd Cir. 1966); *Wilhelm v. Turner,* 431 F. 2d 177 (8th Cir. 1970); *cert. denied,* 401 U. S. 947 (1971). The application of the *absence* of jurisdiction versus the *excess* of jurisdiction test is also unanimously applied among the various circuits. (See cases cited App. p. 21 of Petition) The petitioner does not allege that there is a conflict of decisions among the lower courts nor does he cite any pending litigation or give any indication that the general rule of immunity as applied in this case is a violation of due process or equal protection.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

Bernard J. Ach, *Respondent*

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